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No. 08-432

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

BILLIE THOMPSON AND PATRICIA BROWN,

Petitioners,

vs.

GLADES COUNTY, FLORIDA BOARD OF COUNTY COMMISSIONERS, GLADES COUNTY, FLORIDA, SCHOOL BOARD, HOLLY WHIDDEN GREEN, GLADES COUNTY SUPERVISOR OF ELECTIONS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Petitioners are two individuals.

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ARGUMENT

1. Respondents contend that the creation of a remedial district for African American voters would "discriminate against a Hispanic minority which is larger than Plaintiffs' African American minority." Brief in Opposition ("BIO") at 1, 5. Because the claims here were brought by African Americans, not Hispanics, there is no record that Hispanic votes are diluted or that a districting remedy could be drawn if there were a successful claim brought by Hispanic voters. The only evidence regarding Hispanics is that they vote cohesively with African Americans so there is no basis to conclude that the remedy sought here would violate the rights of Hispanic voters. The premise of respondents' contention seems to be that a remedy for African Americans would preclude a remedy for Hispanics. That concern is entirely speculative. That a remedy might be justified for a claim brought by a different group cannot serve as a basis to deny a remedy for the racial group who proved their votes are being diluted.

At best, respondents' concern is premature. If plaintiffs ultimately prevail, then whether a plan is fashioned by defendants, *Wise v. Lipscomb*, 437 U.S. 535, 542-43(1978), adopted as a result of agreement between the parties, or fashioned by the court, the next step in the process is ordinarily to hear objections, based on the Constitution, statutes or other concerns, from any party or voters in the jurisdiction and to conduct a "fairness hearing." *E.g., Edge v. Sumter County School District*, 775 F.2d 1509, 1510 (11th Cir. 1985)(court must hold hearing to determine if plan it adopts complies with Section 2 of the Voting Rights Act); *Stovall v. City of Cocoa,*

Fla., 117 F.3d 1238, 1243-44 (11th Cir. 1997)(holding that the district court has the "discretion, if not indeed the duty" to conduct an evidentiary hearing to consider any objections to a consent decree plan that changed the method of electing a city council).

2. Respondents are incorrect in their assertion that African Americans are a declining minority group in Glades County. BIO at 5. As noted in the petition for a writ of certiorari, the African American voting age population percentage increased slightly between 1990 and 2000, from 9.65% to 10.12%. Pet. at 4 n.1 (citing Pl. Exh. 33, p. 2).

3. Respondents get the numbers right but their meaning wrong when they argue that the illustrative district disproportionately favors African Americans by giving them a fair opportunity to compete for elected office in 20% of the districts (one out of five) even though they only represent 10.12% of the county voting age population. BIO at 5. It is an argument that lacks all context. As matters now stand, whites have electoral control of all the seats on the county commission and school board (100%) even though they only represent 73% of the county voting age population. Contrary to respondents' claim, the appropriate proportionality review under Section 2 does not suggest that the violation here should go uncorrected in favor of the status quo. *Johnson v. DeGrandy*, 512 U.S. 997, 1000 (1994); *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 436 (2006); *See Stabler v. Thurston County*, 129 F.3d 1015, 1022 (8th Cir. 1997)("Only in a rare case will the population ratios match the fractions of the number of districts such that one group is not over-represented. There is no reason

why the Native American minority in this case should continue to bear the burden of under-representation while the white majority enjoys over-representation.")

4. Respondents mischaracterize petitioners as "argu[ing] that their proposed district is 'close enough'" to 50% to be acceptable. BIO at 7. That was the district court's characterization, Pet. App. at 41, not petitioners'. Petitioners have contended throughout this litigation that their illustrative district, whether slightly over or under 50% in African American voting age population,[1] provides a realistic opportunity for African American voters to elect their candidates of choice. Respondents do not challenge that the district would be an effective remedy—indeed respondents characterize it here and below as a "safe seat." BIO at 5. This brings the issue under both Section 2 and the Fourteenth Amendment into sharp focus. Petitioners proved their votes are being diluted and that an effective remedy is available. No analytical tool—which is all a 50% rule is—should be applied to reject valid claims under either Section 2 or the Fourteenth Amendment.

5. Petitioners included as part of their claim that white crossover votes are properly considered if

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[1] As noted in the petition for writ of certiorari, the illustrative district has an African American voting age population of 50.23%. It is underpopulated from the ideal by 86 persons; the plan overall has a deviation of 8.6%. If 86 persons were added to the district, and all were age-eligible white citizens, the voting age population of the district would be no less than 47.58% African American and the White voting age population would be no more than 37.3%. Pet. at i & 7.

needed to make a remedy effective. They provided evidence of crossover voting through statistical analysis of election returns. The court below used the statistical evidence to find that petitioners had established the second and third *Gingles* prongs, and respondents did not challenge those findings on appeal.[2] Respondents' current argument that petitioners "failed to raise" crossover voting to support the remedy is incorrect. BIO at 4.[3] Petitioners expressly contended in the district court that they presented a claim under both Section 2 and the Fourteenth Amendment "whether or not they are an absolute majority in the illustrative district," and further described their claim as including "the possibility of being a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes from the white majority." DE 41, p, 3 (Statement of Plaintiffs' Case in Pretrial Statement); DE 42, pp. 8-9 (Plaintiffs' Pretrial Brief).

In addition to being wrong, respondents' waiver argument is also irrelevant. Petitioners have been clear throughout this litigation that while white crossover votes may be considered, they are not needed to make the remedy effective because of the substantial presence of Hispanics (15.23%) and the reduction of the white voting age population to approximately 33% in the illustrative district. Indeed, there was never a factual dispute between the parties that the district would provide African

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[2] Pet. App. at 45-46; *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986)(minority vote cohesion and majority bloc voting sufficient to defeat the candidates of choice of the minority).

[3] Respondents cite the dissenting opinion in the Court of Appeals for this statement. It is simply inaccurate.

American voters the potential to elect their candidates of choice. DE 41, p. 19 (joint pretrial statement of issues to be tried). Respondents are in fact correct in describing the district as a "safe" district for African American voters. The defense was a legal one, not a factual one: whether a majority-minority district is an absolute requirement regardless of the existence or size of crossover votes from whites. The opinion below not only applied a 50% requirement, but it held that a supermajority was required in order to provide a remedy. That holding merits review by this Court.

6. On the issue of the totality of circumstances analysis required under Section 2 and the Fourteenth Amendment, the opinion below was flawed in several respects. Petitioners seek, as they did in the court of appeals, a remand for consideration of the totality of circumstances. As previously noted, the court below did not reconcile its findings of intentional discrimination in the adoption of at-large elections for the school board and its finding of some evidence of racial intent in the adoption of at-large elections for the county commission election with its finding that there was "no evidence" of any "tenuous" voting procedures for either body. Pet. at 14; Pet. App. at 80.

Under Senate Factor 5,[4] the district court found that "African American citizens suffer in some ways from the effects of Florida's statutory history of purposeful discrimination," that African Americans in Glades County "suffer lingering socio-economic disadvantages from the past discrimination" which "hinder to some extent the ability of African American residents of Glades County to run for public office." Pet. App. at 50-51. But citing only petitioner Thompson's "respectable showing" in the 1998 primary, the district court concluded that the past discrimination "do[es] not severely impair equal footing in the political process, or significantly reduce participation in the political process." *Id.*

Related to that, the district court considered other African American candidacies under Senate Factor 7.[5] It found that the election of an African American to the county commission in 1976 and another to a city council within Glades County "undercuts plaintiffs' claims." Pet. App. at 52. The nine vote margin of victory of the 1976 candidate occurred when the county African American voting age population percentage was double what it is today, Pet. at 3, and the city council success was under a multi-vote election structure more favorable

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[4] Senate Factor 5: "The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." Quoted in *Gingles*, 478 U.S. at 37.

[5] Senate Factor 7: "The extent to which minority candidates have been elected to public office in the jurisdiction." *Id.*

to minorities. As the panel majority opinion of the court of appeals noted, the underlying facts of those two candidacies and the paucity of minority candidates in the history of the county (there were only three) supported rather than undercut the existence of vote dilution. Pet. App. at 81.

For these and other reasons, remand is appropriate to undertake the "searching practical evaluation of the past and present reality" required under Section 2. *Gingles*, 478 U.S. at 79.

Respectfully submitted,

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